

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

76-7523

United States Court of Appeals

FOR THE SECOND CIRCUIT

RUTH RADOW and SEYMOUR RADOW,

—against—

Plaintiffs-Appellants,

MESSRS. GRENITO, PETERSON, TRAPANI, WALKER, ROSE, YACHNIN and WEXNER,
Constituting the Board of Zoning Appeals of the Town of Hempstead,
State of New York, and THE FOURTH OCEAN PUTNAM CORPORATION,
and THE TOWN OF HEMPSTEAD,

Defendants-Appellees.

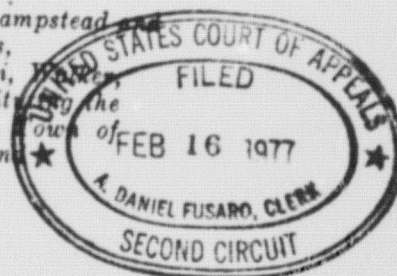
APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX ON BEHALF OF MESSRS. GRENITO, ET AL.,
CONSTITUTING THE BOARD OF ZONING APPEALS OF THE
TOWN OF HEMPSTEAD, STATE OF NEW YORK, AND THE
TOWN OF HEMPSTEAD, DEFENDANTS-APPELLEES

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Decisions of Justice Joseph Suozzi, dated November 20,
1975 and March 24, 1976.

MEMORANDUM

SUPREME COURT, NASSAU COUNTY SPECIAL TERM PART I (4/4/75 - Mot.No.43)

In the Matter of the Application of
MICHAEL BRADY,

By SUOZZI, J.

Petitioner,

DATED November 20, 1975

Vs.

Index No. 3459/75

MESSRS. GREMIO, PETERSON, TRAPANI,
WALKER, ROSE, YACHININ and WEXNER
Constituting the Board of Zoning
Appeals for the Town of Hempstead,
State of New York; and FOURTH
OCEAN PUTNAM CORPORATION,

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This is an Article 78 proceeding to annul the determination of the Board of Zoning Appeals of the Town of Hempstead, which granted to the applicant, Fourth Ocean Putnam Corp., the following:

1. A "special exception" for a transient hotel (Case 245).
2. An "extension of business use" to a depth of 45 feet on a portion of the property zoned Residential "B" in conjunction with the proposed hotel and bath club (Case 244).
3. A "special exception" for a bath club (Case 247).
4. A "special exception" for a swimming pool as an accessory use to the hotel and bath club (Case 248).

The application in Case 246 to park partially on the front set-back area was denied, and therefore is not before this Court for review.

This proceeding followed the Board's decision favorable to Fourth Ocean after it had, pursuant to public notice, conducted several hearings at which both the applicant and objectors were heard and given the opportunity to present expert testimony and documentary proof, and after the applicant had modified its plans for the hotel to meet some of the objections made at the public hearings.

From the petition herein, the Board's Return (which includes the transcripts of the public hearings, the plans of the proposed use and other exhibits), the Board's decision and a visual inspection made by this Court, the following facts are disclosed as to the existing use and the use as approved by the Board of Appeals' actions.

The property involved is located in the Village of Atlantic Beach and has a frontage of approximately 1,250 feet on the south side of Ocean Boulevard, between Vernon Avenue and Putnam Boulevard, and extends south to the Atlantic Ocean varying depths, ranging from 390 to 440 feet. The entire frontage along Ocean Boulevard is zoned "Business" to a depth of 170 feet. The remaining portion, irregular in depths varying from 210 to 270 feet and lying between the portion zoned for business use and the mean high water mark of the Atlantic Ocean, is zoned Residence "B".

The property is presently improved with a six-story hotel, with 100 units, 172 cabanas, 340 lockers, a swimming pool, wading pool, tennis courts, storage facilities, a snack bar and 279 parking spaces. There is a boardwalk along the residentially zoned portion, abutting the business portion. As stated in the Board's decision, "the present facility extends some 30 feet into the Residence 'B' for practically the entire width of the parcel and 50 feet for that portion including the most southerly line of cabanas." The existing facilities are in an advanced stage of deterioration, and in an obviously run-down condition. Inasmuch as these facilities pre-date the Town's Building Zone ordinance, they are presently permissible as non-conforming uses. Although 834 parking spaces are required under present regulations, only 279 are provided.

Fourth Ocean, the present owner, proposes to demolish the existing facilities and to erect a hotel-bath club complex. The proposed hotel will have east and west wings, both five stories in height, and will contain 170 units. The center, or entry, portion of the structure will be two

stories high, and will have a dining room with a capacity of 150 people. The roof of the center portion will serve as a sun deck. The bath club will consist of 100 cabanas and 200 lockers, and a swimming pool.

Except for a snack bar and a portion of the sun deck/terrace, the proposed hotel will be located on the portion of the property zoned "Business" as will all of the parking spaces except 125 spaces. The snack bar, a portion of the sun deck/terrace and 125 parking spaces, as well as the lockers and cabanas which constitute the bath club and the swimming pool (which is an accessory to both the hotel and the bath club) and the boardwalk will be located within a 45-foot strip of property which is residentially zoned, and for which the Board has approved "an extension of the business use" in conjunction with the proposed hotel and bath club (Case 244).

By virtue of the holding in Incorporated Village of Atlantic Beach v. Town of Hempstead (27 A D 2d 556, 19 N Y 2d 209), the Village's zoning and planning are regulated by the Building Zone Ordinance of the Town of Hempstead. This Ordinance permits a hotel within a Business district as a named "special exception". (§Z-5.0(b)(9)). A bath club is also permitted in a Business district as a "special exception" within the category identified as "place of amusement or public assembly" (§Z-5.0(c)(6)). However, since the proposed location of the bath club is within the residentially zoned portion of the parcel, no application for a "special exception" for the bath club was either sought or granted as to the portion zoned "Business".

Neither a hotel nor a bath club is permitted in a Residence "B" district as a matter of right or as a "special exception". This prohibition presumptively applies also to the lockers and cabanas constituting the bath club, to the swimming pool as an accessory use to the hotel and bath club, and to parking. By granting what has been described in the application and in the Board's decision as an "extension of the business use" to a depth of 45 feet into the Residential "B" district, and by granting "special exceptions"

as to this 45-foot extension to permit the cabanas and lockers and the swimming pool, the Board has varied the restrictions of the Residence "B" district.

By this proceeding the petitioner attacks each of the Board's approvals and seeks their annulment. Since each one of them involves separate applications and findings, each will be considered and discussed separately.

Hotel Use as a "Special Exception" in the Business District
(Case 245)

By this application the owner sought and obtained as a "special exception" the right to use the business portion of the parcel for a transient hotel. The grounds of the challenge to this approval are that the findings upon which the Board granted the application are not supported by the evidence, and that the Board failed to consider the impact of the National Flood Insurance Act. The petitioner also contends that the proposed use is not in fact a "transient" hotel, and therefore not within the category of special exceptions permitted by the Zoning Ordinance.

The inclusion in the Business district regulations of the Ordinance of a hotel use as a "special exception" is tantamount to a legislative finding that such a use is in harmony with the general zoning plan and will not adversely affect the neighborhood. Matter of North Shore Steak House v. Board of Appeals of Inc. Vill. of Thomaston, 30 N Y 2d 238, 243. In any event, the Board specifically found that the proposed hotel would meet the four enumerated standards in the Ordinance, after considering the 13 factors listed there. See Ordinance §Z-1.0(B)(a)1-4, and (b)1-13. In this Court's opinion the findings made by the Board as to this use are supported by the evidence.

Insofar as the objection that the proposed use would illegally block the ocean view of the residents on the north side of Ocean Boulevard, it must be noted that the Ordinance itself permits construction in the Business district to a height in excess of the proposed use. Therefore the Court

does not deem this objection well taken, and the Board properly refused to consider this argument as a basis for not granting the "special exception".

As to the National Flood Insurance Program ("Program"), it is clear that the responsibility for compliance with the requirements of this Program lies with the legislative arm of the participating municipality. The Board of Zoning Appeals merely applies the Ordinance as it finds it. In addition, the contention that the Program precludes any construction in the designated flood plain area is contrary to the provisions of the Act itself and to the letters submitted by the objectors from various federal agencies. See 42 U.S.C.A. §§4022 and 4102; and Exhibit P-6 submitted at the Board hearing.

The Regulations of the U. S. Department of Housing and Urban Development (HUD) require municipalities in the Program, with existing building codes, to certify that building permits must first be obtained before construction is commenced. In addition, the municipality must have an official who reviews building permit applications to determine if appropriate flood hazard construction techniques and materials are utilized for new construction in flood plain areas. See Federal Insurance Administration Regulations, Part 1909, Subpart B- Eligibility Requirements, 36 F.R. 24759, Dec. 22, 1971. In granting a "special exception" permit, the Board of Zoning Appeals does not pass on specific questions of construction. The proper agency for that is the Building Department, with its trained and expert personnel.

The objection that the Town will become ineligible to participate in the Program because of any action by the Board of Zoning Appeals is misplaced. Eligibility depends on legislative enactment of standards for land use and flood hazard construction in accordance with Chapter 50 of Title 42, U.S.C.A. (National Flood Insurance Act). The Town Board is the only body with power to legislate those standards. That Board in its legislative capacity is not subject to judicial review other than for constitutionality, not involved here.

Accordingly, the objection that the Board of Zoning Appeals failed to consider the impact of the National Flood Insurance Program is dismissed.

The Board heard testimony that the safety, health, welfare, comfort and convenience of the Town will be adversely affected by the use for which the special exception was sought, due to insufficient water supplies and increase in the intrusion rate of the salt water wedge landward. The Board concluded on the basis of all evidence before it that the water supply could not be affected by the proposed use, and that any salt water intrusion could not be attributed to the specific use. The Board stated at page 671 of the Minutes of the February 5, 1975 hearing as follows:

"The Board finds the objectors' position untenable, that any possible water difficulties are speculative and would apply equally to any use permitted as a matter of right anywhere in the Town of Hempstead."

The Court has reviewed the record and finds it sufficient to sustain the Board's conclusion that the water problems raised by the objectors are speculative and not a proper basis for a denial of the special exception permit.

The question raised by the objectors and the petitioner as to whether or not the proposed use is in fact a transient hotel is understandable in view of the design of each of the hotel units. As described in the Board's decision, each unit was to consist of a full bath, powder room and toilet, 12' x 12' bedroom, 12' x 16' living room, 10' x 11' entry foyer, dressing room with vanity, 12 lineal feet of closet space, storage space and a six-foot wet bar. A typical unit was to be 750 square feet in area, although several units on each floor were to be somewhat larger. As a manifestation of its intention to operate a transient hotel rather than an apartment hotel, the applicant represented at the last hearing that the wet bar would be removed from the construction plans, and that there would be no kitchen facilities available in any of the units.

Clearly, if the proposed structure could not reasonably be utilized as a transient hotel, a denial would have been the more appropriate disposition of this application. An expert who testified at the hearing in behalf of the objectors acknowledged that it was possible to operate the

planned structure as a transient hotel, although there might be a problem. On the basis of the testimony of the objectors' own witness, and in the face of the applicant's representations as to the absence of a wet bar or kitchen facilities, it was not unreasonable for the Board to deem the plans to be in conformity with a transient hotel use and to pass on the application on the basis that it was a permitted special exception. Although the Board's approval does not expressly condition the proposed use on the elimination of the wet bar and a covenant that kitchen facilities would not be provided in any of the units, such conditions are implicit in the Board's emphasis that the use approved was a transient hotel. The operation of the proposed structure as an apartment hotel rather than as a transient one would clearly be an illegal use and the public, including the Village and the Town, would have a clear remedy to abate it. Therefore the Board correctly refused to predicate a denial on the possibility of a future illegal use.

For all of these reasons the Court finds that the Board's approval was not arbitrary and capricious, and was reasonable under the circumstances and not subject to annulment by this Court.

Extension of Business Use to the Residence "B" Portion
of the Parcel - (Case 244)

By this application the owner sought "an extension of business use" for 75 feet south into the Residence "B" district in conjunction with the proposed hotel and bath club on the grounds of practical difficulty and unnecessary hardship. The Board granted the application, but limited the incursion into the Residential "B" district to a depth of 45 feet instead of 75 feet. The approval was based upon a finding that the "extension of business use" into the Residence "B" district was an existing and accepted area characteristic. Fifty feet of the residential portion abutting the business parcel are presently occupied by a 30-foot boardwalk and lockers and cabanas and refreshments areas, which will be demolished and replaced.

Similarly zoned land to the west of the subject property is being used for a boardwalk and cabanas under it to a depth of approximately 39 feet into the Residence "B" district.

The Board in its decision explained its reason for the limitation of the extension to a depth of 45 feet as follows:

"However, this Board finds neither practical difficulties nor unnecessary hardship to justify the extension sought in its entirety. The Board has carefully examined applicant's plot plan and finds that an extension of 45 feet will permit a reasonably sized cabana with adequate walks abutting. The Board finds that applicant's concept of a luxury type transient hotel with spacious cabana facilities is a reasonable use for the parcel; that the extension of business use limited to 45 feet will permit such reasonable use with no adverse effect on, or change in, the area character. The Board finds that any deeper business incursion into the Res. 'B' district would actually change the area character and subject the entire beach area to business use."

The powers and authority of the Board of Appeals are circumscribed by statute. Specifically, the Board may (1) grant a variance which would permit a property owner to use property in a manner forbidden by the ordinance "when there are practical difficulties or unnecessary hardship" in the way of carrying out the strict letter of the zoning regulation (Z-1.0(A)), and (2) permit the use of property as a "special exception" if that use is expressly permitted by the Ordinance in the zoning district for which it is sought. A distinction between "area variances" and "use variances" has been developed by Court decisions construing the statutory provisions relating to variances. These cases also prescribe the showing required for each of these types of variance.

The statute provides for no category of zoning applications other than variances or special exceptions. The consistent use by the respondents of the terminology "extension of business use" and the avoidance of the term "variance", both in the application and the Board's decision as well as in the memorandum of law submitted by them in this proceeding, suggests that an "extension of business use" is another category of zoning which the Board is empowered to grant, and that there is a distinction between a "variance" and an "extension of business use".

The respondents have cited several cases as authority for the use of this terminology. However, as this Court reads those cases, they do not recognize or establish the existence of a category called "extension of business use" into another zoning district, but merely describe "extension of business use" as a consequence of the variance which was the subject of review.

The respondents' preference for this terminology and their avoidance of the established terminology of the Ordinance can only lead to confusion as to the true nature of the zoning application and to a blurred application of the principles pertinent to the granting or denying of such an application. The acknowledgment by the applicant and by the Board, after inquiry by the Court, that the application was actually one for a "use variance" dispels any doubts as to the nature of the application, and crystallizes the principles applicable upon a judicial review of the Board's action.

It is well established that the standard of proof required for a use variance differs from that of an area variance. Compare Matter of Pulling v. Palumbo, 21 N Y 2d 30, 33, and Williams v. Town of Oyster Bay, 32 N Y 2d 78, 81; and see Matter of North Shore Steak House v. Board of Appeals of Inc. Vil. of Thomaston, supra. Use variances require proof of special hardship--dollars and cents proof that the property for which a use variance is sought does not yield a reasonable return. Daurnheim v. Town Board of Hempstead, 33 N Y 2d 468.¹ "The long-established rule for the grant of a use variance requires a showing that '(1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning itself; and (3) that the use to be authorized by the variance will not alter

1. While this case involved the constitutionality of a zoning ordinance as applied to a particular owner's property, the considerations are much the same as those prescribed for the grant or denial of a variance. See Williams v. Town of Oyster Bay, supra, at 81.

the essential character of the locality' (citations omitted)". Williams v. Town of Oyster Bay, supra, and see Daurnheim v. Town Board of Hempstead, supra. It would appear that the requirement of "unique circumstances" is no longer pertinent. Williams v. Town of Oyster Bay, supra, Note 1; and see Daurnheim v. Town Board of Hempstead, supra, at 477, and Jayne Estates, Inc. v. Raynor, et al., 22 N Y 2d 417.

The basis for the "use variance" application is practical difficulties or unnecessary hardship. The courts will uphold the granting of a use variance upon a showing of unnecessary hardship without a showing of practical difficulties. Otto v. Steinhelber, 282 N. Y. 71. The Board found "neither practical difficulties nor unnecessary hardship" to justify extending the business use to a depth of 75 feet, but made no express finding as to the presence or absence of these criteria in granting the "extension of business use" to a depth of 45 feet.

The reason given for the limitation of the incursion to 45 feet is that an extension of 75 feet "would actually change the area character and subject the entire beach area to business use." This implies that a 45-foot extension would not have a similar effect. Inasmuch as the number of cabanas and lockers and the size of the pool remain unchanged, the limitation does not effectively produce a result which is substantially different from that proposed by the approval of the extension of 75 feet. Therefore the rationale for the Board's conclusion is not entirely clear to the Court.

It is quite clear on the record that the extensive beach frontage is for the exclusive use of the patrons of the facilities to be provided in accordance with the proposed uses. Since this frontage is part of the portion of the parcel for which no variance or special exception has been sought or obtained, it is highly unlikely that this portion will be put to any use other than those proposed by the applications involved here. The limitation of the variance to 45 feet prevents the construction of lockers and cabanas

and a pool beyond that depth, but does not inhibit the use of the remainder of the residential portion as an integral part of the proposed uses. For that reason this Court views the approval of this application, however limited on its face, as tantamount to a use variance for the total residential portion in connection with the proposed uses. The effective result is the same, once the variance is approved, as if this parcel had been rezoned for these proposed uses.

The power of the Board of Appeals to accomplish this result has been approved and recognized by the courts of the State only when it has been established that the use is (1) compatible with the existing land pattern, and (2) that the denial of that use precludes the owner of the property from obtaining a reasonable return from the property because of the existing zoning regulations. Williams v. Town of Cyster Bay, supra. In the absence of such a showing, this result can only be accomplished by the Town Board through the legitimate exercise of its zoning powers. The rezoning of all or a portion of the residential portion by the elected Town Board so as to permit the uses herein proposed could in all likelihood legally withstand challenge. However, for the same result by the appointed Board of Appeals to withstand an attack such as is mounted here, the two essential elements prescribed as conditions precedent for approval of a use variance must have a reasonable basis in the record before the reviewing court.

The primary purpose of judicial scrutiny of any determination by a Board of Zoning Appeals is to insure adherence to the parameters prescribed, and to prevent an appointive administrative board from exercising the legislative power of rezoning without abiding by these standards. This scrutiny is a particularly sensitive duty in the matter at hand in the light of the denial to the elected officials of the Village of Atlantic Beach of a basic and fundamental home rule power, to wit, the power to control the zoning within the boundaries of that Village. See Village of Atlantic Beach v. Town of Hempstead, supra.

The justification for the Board's approval of this application, as expressed in its decision, is that the proposed use is "an existing and accepted area characteristic", and that the "concept of a luxury type transient hotel with spacious cubana facilities is a reasonable use for the parcel." The Court considers this statement as a finding that the use to be authorized by the variance will not alter the essential character of the locality, and is compatible with the existing land pattern. Such a finding is well supported by the record, which discloses the long-standing non-conforming uses existing on the residentially zoned portion of the parcel and a similar use on other nearby property. Certainly the replacement of the existing non-conforming facilities with those proposed by the applicant would be in conformity with the area characteristic.

However, in approving this application, the Board has made no express finding to the effect that the property for which the use variance is sought could not yield a reasonable return if limited only to the uses permitted under the Residence "B" zoning regulations. The applicant did present proof that the present facilities were "rundown", and were operating at a loss. Audited profit and loss statements for the immediately preceding period of a year and one-half were submitted, showing net operating losses. The applicant's expert witness stated that the highest and best use of the property was for a hotel. He also testified as follows:

"... under the code of the Town of Hempstead, there are a number of permitted uses in the residence B zone and the common or normal one for that particular parcel is one-family residences, homes. It is inconceivable to think of that residential use district, the extension of business use, for one-family homes, by virtue of its location behind business, and between the Atlantic Ocean and the beach and the business property. The logical use of that parcel is in conjunction with the business frontage." (Minutes, Board of Zoning Appeals, April 24, 1974, p. 7304.)

The financial data which was presented as to the returns from the present operation justify the replacement of the existing rundown hotel with a luxury-type transient hotel as a special exception on the business portion. However, it does not establish that the remainder of the parcel

will not yield a reasonable return as presently zoned. See 2 Bachkopf, Law of Zoning and Planning (2d Ed., 1972), p. 45-47. The unsupported conclusion of the applicant's expert witness by itself is not sufficient to meet the burden of the dollars and cents proof of lack of reasonable return. See 2 Anderson, New York Zoning Law and Practice (2nd Ed., 1973), §18.12; and Matter of Congregation Beth El v. Crowley, 30 N 2d 90, 93.

However, the Court notes and the record discloses that the same property has been the subject of at least nine zoning applications over the past 14 years, the earliest of which dates back to 1951 and the most recent (prior to the present applications) to June of 1973. It is therefore not unreasonable to assume that the Board members in deciding this case, and without having expressly set it forth in the record, have relied upon their personal knowledge and expertise and familiarity with the parcel and with the area, and with the problems which militate against the economic and reasonable use of the residential portion of this parcel for one-family houses or for any other use, if any, for which this parcel might otherwise be reasonably suited under the present zoning. The decision of the Board also indicates that the Board has had other matters before it dealing with other similarly situated properties in the area.

The reliance of the Board on such knowledge or facts is neither unreasonable nor improper. See Matter of Von Kohorn v. Morrell, 9 N Y 2d 27, 38; 2 Anderson, supra, §20.19. However, these facts are not readily apparent to this Court, either from the bare record or after a personal inspection of the site and the area. Without their being made a part of the record, this Court cannot make a determination as to whether or not there is a basis for the finding of financial hardship necessary for the grant of a use variance by the Board of Appeals. See 2 Anderson, supra, and cases there cited, and compare Community Synagogue v. Bates, 1 N Y 2d 445, 454, with Matter of Von Kohorn v. Morrell, supra.

For this reason this Court will direct that a hearing be had before it so that the applicant may present such additional facts relating to the issue of financial hardship as are available to it. At the same time the petitioner will have an opportunity to present any opposing proof which he may wish to present on this issue. By following this procedure a final determination may be made without the necessity of a renewal of the proceeding after a remand to the Board, and without incurring the delay inherent in that procedure. In this Court's view it serves the best interests of all to reach a final disposition of this protracted zoning controversy as expeditiously as possible. Accordingly, the short form order entered simultaneously herewith will provide for a hearing before this Court on the issue of financial hardship.

The petitioner also contends that the Board's grant to the applicant of the use of the boardwalk was "tantamount to an easement". Of course, the Board has no such power, nor did it purport to so act. Any rights the applicant has by virtue of the reservations in the deed from Atlantic Beach Holding Corp. to the Town of Hempstead dated June 3, 1954, are not involved in the zoning appeal. To the extent that the applicant has such rights, their exercise is subject to the Zoning Ordinance. All that the Board granted was permission to exercise those rights under the Ordinance. Accordingly, the grant with respect to use of property in the Residence "B" district may not be attacked on this basis.

Bath Club and Swimming Pool as Special Exceptions
(Cases 247 and 248)

In view of the Board's approval of the use variance which permits the use of 45 feet of the residential property in conjunction with the proposed hotel and bath club, the need for any additional approval for the lockers and cabanas and the swimming pool is not readily apparent to this Court, since these facilities constitute the bath club. Furthermore, this Court knows of no authority for permitting these special exceptions in a

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Residence "B" zone without an amendment of the zoning requirements permitting such uses as special exceptions in that zone. The fact that a use variance may have the same practical effect as a rezoning for that use is not of itself a basis for superimposing a special exception on that use variance. However, inasmuch as there will be a hearing before this Court with respect to Case 274 (the use variance application) on the issue of financial hardship, this Court will withhold determination as to these two cases pending the conclusion of the hearing. [At the time of the hearing the respondents may furnish to the Court such authority and precedent for the approval of these two special exceptions on which they may have relied, or otherwise explain the rationale of these approvals.]

The final determination of this proceeding is held in abeyance pending the hearing hereinabove provided for.

Short form order signed simultaneously herewith.

J. S. C.

MEMORANDUM (1 PRELIMINARY)

SUPREME COURT, NASSAU COUNTY, SPECIAL TERM PART I (12/8/75, 1/9/76)

IN THE MATTER OF THE APPLICATION
OF MICHAEL BRADY,

Petitioner,

BY SUOZZI, J.

MESSRS. GRINITO, PETERSON, TRAPANI,
WALKER, ROSS, YACININ and WECHER
Constituting the Board of Zoning
Appeals for the Town of Hempstead,
State of New York; and FOURTH
OCEAN FURNISH CORPORATION,
Respondents.

DATED March 24, 1976

Index No. 3459/75

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By a memorandum decision dated November 20, 1975, the determination of this Article 78 proceeding was held in abeyance pending (1) a hearing before this Court in lieu of a remand to the Board of Appeals, and (2) an explanation or statement by the Board of the rationale or authority for the approval of a) the "special exception" for a bath club (Case 247) and b) the "special exception" for a swimming pool as an accessory use to the proposed hotel and bath club (Case 248). The hearing was commenced on December 8, 1975, and was concluded on January 9, 1976.

Motion of Village of Atlantic Beach to Intervene

Between the commencement and conclusion of the hearing a dispute arose, for reasons unnecessary to detail here, between the petitioner and his attorney. As a result the petitioner's attorney was permitted to withdraw by the Court without objection and in lieu of a discharge by the petitioner, and at the same time to appear as special counsel to the Village of Atlantic Beach, which had participated at the Board of Zoning Appeals hearing but had not appeared except as amicus curiae in this proceeding.

At this point the Village moved to intervene as a party, to which application both the petitioner and the respondents objected for different reasons. The Court having reserved decision on that application, will dispose of this procedural matter initially by granting that action.

The right to intervene by permission lies in the sound discretion of the Court. See CPLR 1012. Here, there are compelling reasons for permitting intervention in addition to the substantial interest of the Village and the common questions of law and fact. The petitioner now appears pro se, and is not an attorney. His former attorney, who is now "special counsel" to the Village, has a special knowledge of this complex matter which should not be lost to the Court or to the petitioner, despite the discharge. At the last hearing, the sole witness in opposition to respondent was presented by the Village. Without the status of intervenor, that witness's testimony would not be a part of the record before this Court.

Moreover, as this Court noted in its November 20th decision, although this Village's zoning and planning are regulated by the Building Zone Ordinance of the Town of Hempstead, the tasks and responsibilities of supervising construction, approving building plans, issuing certificates of occupancy and enforcing compliance with building codes and ordinances are left to the Village. Therefore, their interest in the ultimate outcome of this proceeding is substantial. In addition, the issues raised by the Village are identical to those of the petitioner. Until a change had occurred in the legal representation of the petitioner and the Village, the Village's participation as *amicus curiae* was sufficient. In view of the altered relationships between the petitioner and his attorney, and between that attorney and the Village, the Village's participation on an informal basis may not be sufficient.

Accordingly, in the interests of justice, the Village of Atlantic Beach is granted leave to intervene. The lack of a proposed pleading required by CPLR 1014 is excusable here as no party could possibly be prejudiced.

The claim of the Village has been known to all throughout the proceedings, and is the same claim made by the individual petitioner.

Bath Club and Swimming Pool as Special Exceptions

The attorney for the Board of Appeals has explained by letter to the Court dated February 25, 1975, that the special exception applications for the bath club (Case 247) and for the swimming pool (Case 248) actually relate to the business portion of the property, and were made so as to permit the use of that portion of the property for the placement of those bath club facilities as may be proposed for the business portion, and as a means of ingress to and egress from the bath club facilities, such as the cabanas, lockers and swimming pool, which are contemplated for construction on the residential portion if the use variance for these facilities is authorized.

A bath club use is a permitted special exception use in this business district, and the Board's approval of the special exception applications for the commercially zoned portion of this property to permit the operation of a bath club thereon, in conjunction with the "transient hotel", is supported by the evidence. This Court views those applications, as well as their approval by the Board, as part of a combined "hotel and bath club use", and not as an approval of a bath club separate and apart from the hotel use. In other words, this Court does not deem that these approvals would permit the applicant or owner of the property to use the business portion of the property (or the residential portion, if the use variance is authorized) for a bath club which is not a part of, or at least built or operated in conjunction with a transient hotel.

Purpose of Court Hearing on Issue of Reasonable Return in lieu of A Remanded Hearing before the Board of Zoning Appeals.

In approving the use variance for 45 feet of the residentially zoned portion to permit the construction thereon of the bath club facilities such as cabanas, lockers and swimming pool in conjunction with the hotel and bath club use, the respondent Board of Appeals did not make "an express finding

that the property for which the use variance is sought could not yield a reasonable return if limited only to the uses permitted under the Residential "B" class regulations. Upon a review of the return filed by the Board in this Article I proceeding, this Court concluded that the proof presented at the hearing did not establish that the remainder of the parcel (referring to the residential portion) will not yield a reasonable return as presently zoned."

The hearing directed to be held before this Court was in lieu of a return to the Board of Zoning Appeals, and was intended to provide the owner with the opportunity to "present such additional facts relating to the issue of financial hardship as are available to it", and at the same time provide the petitioner an opportunity to present opposing proof. In holding that the record did not support a finding that the remainder of the parcel will not yield a reasonable return if limited to the uses permitted by the present residential "B" classification, and noting that the Board had made no express finding on this yield, this Court in its memorandum decision also stated the following:

"However, the Court notes and the record discloses that the same property has been the subject of at least nine zoning applications over the past 14 years, the earliest of which dates back to 1961 and the most recent (prior to the present applications) to June of 1973. It is therefore not unreasonable to assume that the Board members in deciding this case, and without having expressly set it forth in the record, have relied upon their personal knowledge and expertise and familiarity with the parcel and with the area, and with the problems which militate against the economic and reasonable use of the residential portion of this parcel for one-family houses or for any other use, if any, for which this parcel might otherwise be reasonably suited under the present zoning. The decision of the Board also indicates that the Board has had other matters before it dealing with other similarly situated properties in the area.

"The reliance of the Board on such knowledge or facts is neither unreasonable nor improper. See Matter of Von Kohorn v. Morrell, 9 N Y 2d 27, 38; 2 Anderson, *supra*, §26.19. However, these facts are not readily apparent to this Court, either from the bare record or after a personal inspection of the site and the area. Without their being made a part of the record, this Court cannot make a determination as to whether or not there is a basis for the finding of financial hardship necessary for the grant of a use variance by the Board of Appeals. See 2 Anderson, *supra*, and cases there cited, and compare Community Synagogue v. Bates, 1 N Y 2d 445, 454, with Matter of Von Kohorn v. Morrell, *supra*."

This further hearing was directed with the reasonable expectation that the knowledge or facts on which the Board has relied, and which were "not readily apparent to this Court" at that time, would be made part of the record of this proceeding.

Proof Presented at the Hearing

At the hearing the applicant produced two witnesses, a real estate expert and a certified public accountant.

The testimony of the real estate expert was intended to establish the following:

1. That the 75 by 1,253-foot parcel for which the use variance is sought is not reasonably suited for any of the following permitted uses: A public school, parochial school, private school, agricultural use, nursery, roadway or passenger station.
2. That this parcel, which can physically accommodate ten residential units, will not yield a reasonable return if so utilized, and such utilization of the parcel is not economically feasible.
3. That the utilization of the whole parcel for one-family residences which is permissible under the existing zoning regulations applicable to the two portions will not yield a reasonable return, and is economically unsound and impractical.

The applicant's other witness proposed to establish that a reasonable return could only be realized for the whole parcel by the combined utilization of the business portion and a part of the residential portion for a combined hotel and bath club.

The only proof in opposition was presented by a real estate expert presented by the Village to show that the utilization of the whole parcel for twenty (20) residences would produce a reasonable return. No other

dollar and cents proof was offered by the Village or petitioner as to any other proposed use of the parcel.

By statements made both at the hearing before the Court and the Board of Zoning Appeals the opponents have contended that the property can yield a reasonable return either by the rehabilitation of the existing facilities or by the utilization of the whole parcel for one-family homes, in accordance with the existing regulations. Except for the statement of their contention that the existing facilities can yield a reasonable return if properly managed and operated and the owner had not allowed them to become run-down, no dollar and cents proof was presented on this point.

In the absence of any proof or other basis for a permissible contrary finding or inference, it must be assumed for the purposes of evaluating the proof submitted as to reasonable return that the acquisition cost of \$824,700.00 reflected the reasonable value of the property with the improvements thereon and that this capital investment is properly included in any computation of the return. As to the taxes paid since the acquisition, the sums are more properly items of expense related to the operation of the existing facilities for which tax benefits as are available have accrued to the owner-applicant. They are not properly included in the determination of reasonable return for the purpose of the issue before the Board and this Court.

The Applicable Test of Financial Hardship to Sustain a Use Variance

As to the utilization of the 75 by 1,253 strip for which the use variance is sought the applicant's expert testified that this area of about 94,000 square feet or 2.3 acres would accommodate ten (10) legal one-family residences if five streets were provided, running from Ocean Boulevard to a cul-de-sac at the southerly boundary of the strip. The total cost to provide access to these lots and to improve them he estimated at \$401,250.00,

or \$40,125.00 each, including the following:

1. \$145,000.00 to provide sewers and access road
2. \$157,000.00 representing the value of the portions of the business property dedicated to road purposes
3. \$192,500.00 representing the diminution in the value of the business property as a whole resulting from this division of the business property by five streets
4. \$50,000.00 for the raw, unimproved residential land.

He estimated the cost of constructing each residence at \$49,000.00. Assuming a 10% margin of profit, the total estimated cost including a profit on each improved lot would be \$98,000.00, exclusive of demolition costs, seawalls, grading and cover fill, and the engineering, advertising and financing costs. He further stated the residential property would be adversely affected by the development of the adjacent business parcel for business use; the residential property would not be mortgageable; and, it is unlikely any prudent builder would so develop this property.

Until this Court put the respondents on notice that it would not sustain this use variance on the basis of this testimony proof, the applicant contemplated no further offer of proof. The applicant as well as the Board of Zoning Appeals contended that this proof of insufficient return from this 75 foot residential parcel sufficed to sustain the use variance on the basis of their interpretation of this Court's memorandum decision herein. If the Court's decision was susceptible to such an interpretation, it must be attributed to a deficiency in the articulation of the issue and not to the Court's concurrence with the respondents' view of the applicable standard to measure reasonable return. The parties were thereupon advised that the applicant would have to at least show that the business frontage alone cannot yield a reasonable return for the whole parcel or that a reasonable return is only possible by a use of part of the residential portion in conjunction with the business portion.

There was thus presented a threshold issue at the hearing as to the test of financial hardship to sustain a use variance.

By way of clarifying its contention, the Town Attorney argued that in the case, for example, of a parcel with a business frontage of 100 feet on a mapped street and a business depth of 100 feet together with a residential depth of 10 feet a use variance must be sustained as to the 10 foot strip upon a showing that it cannot yield a reasonable return of its use is limited to the uses permitted by the residential regulation, even if the use of the business portion alone was capable of producing a reasonable return on the capital investment in this whole parcel.

In support of this position two cases are cited, to wit, In the Matter of Carrolls Equities Corp. v. Chave, 37 A D 2d 847; In the Matter of Mika Realty Corp. v. Horn, 19 A D 2d 724, which deal with split-zoned parcels for which variances were granted as to the residential portions thereof presumably on the basis that the residential portion would not yield a reasonable return without a use variance. Neither of these two cases or any of the cases dealing with use variances provide any guidance in the issue since there is no explicit discussion of it. In the absence of a direct confrontation with this issue this Court does not view those cases as binding or conclusive on this point and considers this issue as one of first impression.

Standing alone each of the residential parcels in the cases cited and in the example posed, and in the instant case are landlocked. A permit could not be legally issued for any one of these parcels because each lacks the required legal access to a mapped street. In a factual situation where legal access exists a permit could be withheld because of the insufficiency of the area involved. The sterilization of each of these

residential parcels standing alone cannot be attributed to zoning classification but is due to the lack of access or insufficiency of area.

In such a sterilized condition one of these parcels standing alone are not capable of producing a return. Therefore, a test which relies upon a return from such a parcel standing alone rests on a fictional and false assumption which has no basis in law or in fact. The fallacy of relying upon such a test is demonstrated by the very proof that was offered here with respect to the 75 foot residential strip.

The proof as presented does not relate to the strip standing alone but rather to this strip to which has been appended the required legal access. The estimates of costs and the diminished valuation of the business portion of the parcel, which render the utilization of the strip for one-family homes unrealistic, relate to providing access over the business portion of the parcel to this strip. Such items are not relevant to the determination of return from the strip standing alone.

If the appropriate test to sustain a use variance is the one advocated by the respondents then it must follow that in every split-zoning situation, the resulting landlocked residential portion is entitled to a use variance.

For these reasons the Court rejects the test advocated by the respondents and strikes all of the dollar and cents proof relating to the utilization of the 75 foot strip from the record as being immaterial and having no probative value in this proceeding.

A use variance in the case of split-zoned parcel which results in a landlocked residential portion without legal access, regardless of the size of this portion, or of insufficient minimum area in the event legal access exists can only be sustained upon a showing that a reasonable

return for the whole parcel cannot be produced by the utilization of the (1) business portion alone or (2) the whole parcel for one-family homes which is permissible in a parcel which is split-zoned into a commercial and residential portion, or (3) that a reasonable return necessitates a use variance which permits utilization of all or part of the residential portion in conjunction with an existing or proposed use of the business portion.

It is in accordance with these stricter standards that the dollar and cents proof presented will be analyzed with respect to issue of financial hardship.

Utilization of Whole Parcel for One-Family Homes

Applicant's Expert Opinion

The applicant's real estate expert testified that the whole parcel can physically accommodate forty-eight (48) one-family homes in building lots conforming to the minimum area requirements of 6,000 square feet.

He estimated the cost per house pursuant to this proposal at \$108,000.00. This estimate included the following:

Cost of lot	- \$30,000.00 computed on basis of purchase price of \$824,000.00 and taxes paid since purchase of \$350,000.00
Improvement cost	- \$19,000.00
Construction cost	- \$49,000.00
% profit	- \$10,000.00.

These estimates of cost did not reflect higher construction costs attributable to the strict code requirements for residences in a business district. In his opinion a one-family residence was not salable for a price in excess of \$100,000.00 on the basis of his search for comparable sales which disclosed that the highest comparable sale price was \$73,000.00.

This testimony was presented without the benefit of a proposed layout. In the absence of any contrary proof or permissible inference, it must be assumed that his opinion was based on the maximum and least expensive utilization of the whole parcel. This expert's opinion as to the sales price of residences on this parcel does not reflect the most informed knowledge as to the salability of residences in this community and, therefore, this Court does not accept his testimony with respect to the value of the improved lot and the salability of these units as being reliable or realistic.

Even though the residences here can conceivably sell for a higher price than this expert suggests, it is nonetheless clear that this is not an ideal site for residential development and that the problems presented add substantially to the costs of construction and providing the required improvements. The higher costs must be reasonably contemplated because of (1) the boardwalk which divides the parcel in half and renders the cost of roads beyond it more costly, (2) the costs of demolishing the existing facilities, (3) because of the protection required due to the oceanfront exposure, and (4) the site work to grade the parcel and prepare it for development. In this Court's opinion the utilization of this whole parcel in accordance with the proposal is not a reasonable or economically feasible one for this site even if the real estate taxes paid are deemed an item of expense in connection with the present operations and not a capital investment for the computation of return.

Opponent's Expert Opinion

The Village presented as its expert a real estate broker and appraiser with twenty years experience in waterfront property exclusively in Suffolk County. His testimony was based entirely on the assumed comparability of Westhampton Beach in Suffolk County and Atlantic Beach.

This witness proposed that the parcel be subdivided into twenty

(20) lots, each having a frontage of sixty feet on Ocean Boulevard and running the full length of the property in depth. In his opinion each of the lots, which would not require street improvements, would be worth \$50,000.00 based on \$1,000.00 a foot for this ocean frontage. Each of these lots could be sold with a residence constructed thereon which would command a price from \$139,000.00 to \$172,500.00 depending on the size of the residence to produce a reasonable profit on each lot or as an unimproved lot at \$50,000.00 each. This latter proposal would result in a total income of \$1,200,000.00 which would reflect a profit of \$375,300.00 over the \$824,700.00 invested to purchase the property with the existing facilities, exclusive of the real estate taxes paid since acquisition which he regarded as an item of expense and not a capital investment.

The testimony as to the sale of the lots with a residence was too conjectural to provide a basis for a finding that such a utilization could yield a reasonable return.

As to the sale of the lots in an unimproved state, the Court does not believe that a \$50,000.00 price tag is an unrealistic one for an ocean front parcel. However, each of these parcels are encumbered with a boardwalk easement which detracts from the value. It does not appear that this witness took this into consideration in placing such a value on each of these lots. Furthermore, his computation of the profit in the event of such a sale disregards completely the costs of demolishing the existing facilities and placing each lot in a salable condition or any obligation with respect to the boardwalk.

The testimony by this expert strikes this Court as an oversimplification of the problem of utilizing this parcel and does not reflect a reasonable or realistic approach to the problem. Therefore,

this Court cannot rely on this testimony for a finding that a reasonable return will be produced by such a utilization even if that return is limited to the cost of acquisition and excludes any return for the real estate taxes paid since acquisition.

Utilization of Parcel for Combined Hotel and Bath Club

The applicant's accountant testified as to the income and expense projected from the combined hotel and bath club on the business portion and a part of the residential portion and on the basis thereof he concluded that (1) in order to obtain a reasonable return from this parcel a part of the residentially zoned area must be used in conjunction with the business portion to operate a combined hotel and bath club and to comply with the parking requirement; (2) the operation of a hotel on the business portion without a bath club was not economically feasible; and (3) that a combined hotel and bath club with sufficient facilities to maintain the level of income necessary to yield a reasonable return and with on-site parking as required by the ordinance was not a physical possibility on the business portion alone.

The total income of \$1,330,000.00 from a hotel and bath club operation was projected on the basis of an estimated annual rental of \$6,000.00 for each of the 170 hotel units, \$1,200.00 for each of the 100 cabanas and \$500.00 for each of the 200 lockers and miscellaneous revenue of \$90,000.00 from the snack bar and restaurant and telephone and the parking concessions. The total expenses projected were \$566,000.00 for operating expenses and \$660,000.00 for debt service (11% of \$6,000,000.00), which resulted in a net profit before taxes of \$104,000.00 reflecting a return of 7% on the basis of owner's cost of acquisition of \$824,700.00 and real estate taxes paid since the property and the existing facilities were acquired in 1972.

These projections as to income and expense are based upon certain factual assumptions as to which no other proof was presented. In the absence of any proof or permissible inferences to the contrary, the Court is left with no alternative but to analyze the proof and evaluate the conclusions predicated thereon on the premise that the figures relied on are substantially reliable and accurate.

The "per foot" cost of construction of \$30.00 employed to estimate the cost of construction is not an unrealistic one. The plans submitted indicate that the 200,000 square feet of building area is a fairly reliable computation of the building area involved. Thus, the \$6,000,000.00 estimated as the cost of construction and as the extent of the permanent financing needed provides a reliable basis for the projection made. Without the benefit of testimony from a more informed source as to the rentals which the proposed facilities are likely to produce the annual rentals predicted by the accountant constitute an acceptable basis for projecting the income. The projected net profit of \$104,000.00 reflects a return of approximately 13% on the capital invested in the acquisition of the property, exclusive of any carrying costs for taxes paid.

In view of the rental income anticipated from the proposed cabanas and lockers, the accountant's conclusion that the proposed hotel without a bath club cannot be profitably operated is a supportable one on the evidence presented.

Clearly the 216,000 square feet of area which comprises the business portion of the parcel cannot accommodate all of the facilities proposed and the required off-street parking. A reduction in the size of the seemingly over-sized hotel units would not make sufficient area available to accomplish this objective.

As the accountant properly points out, a reduction in the total number of hotel units is not a plausible alternative either. To maintain the level of income needed to make the combined hotel and bath club a profitable operation, for every hotel unit eliminated by this alternative proposal five cabanas or twelve lockers must be substituted. The increased off-street parking spaces for these additional cabanas or lockers cannot be provided within the boundaries of the business zone.

Another alternative which was not discussed by the witness is the utilization of the business portion solely for a bath club consisting of cabanas, lockers, a swimming pool and restaurant. Clearly the elimination of the multi-story hotel would free the land for the bath club facilities and would substantially decrease the costs of construction, the debt service, and expenses such as real estate taxes and payroll. Assuming this to be a viable proposal in terms of the demand for such a facility in this area and a reduction in the overall expenses, including debt service, to \$500,000.00 (which is less than half of the expenses projected for the combined hotel and bath club), a gross income of about \$582,000.00 is required to yield a 10% return on the \$824,700.00 invested in the purchase of the property. The cabanas and lockers needed to produce this level of income, assuming the miscellaneous income of \$90,000.00, together with the off-street parking spaces to comply with the zoning regulation, cannot be physically located within the limited area of the business portion, so that this alternative is not a plausible or practical one without the utilization of a part of the residential portion.

Findings and Conclusions

The evidence, therefore, sustains the findings that the applicant has demonstrated, in accordance with the stricter standards applied by the Court, that a reasonable return cannot be realized either by the (1)

utilization of the whole parcel for one-family homes pursuant to any realistic subdivision layout or (2) the utilization of the business portion alone for (a) a combined hotel and bath club or (b) a hotel without a bath club or (c) a bath club without a hotel. The conclusion is inescapable that the financial hardship imposed upon this parcel by this split-zoning can only be relieved by permitting a use of part of the residentially zoned portion in conjunction with the business portion for a viable use such as the one contemplated by the applicant.

The respondent Board evidently perceived the hardship imposed upon this parcel without more dollar and cents proof. In approving the variance without a specific finding as to reasonable return it recognized that the imposition of this restrictive zoning upon a portion of the parcel already limited its use by the natural forces of the ocean and by the boardwalk easement which involves almost an acre of the residential part effectively sterilized five of the ten acres against any use for which these acres were reasonably suited. In approving the use variance the Board presumed to grant relief to the owner directly without recourse to the Town Board for a rezoning of the residential portion.

There is no question in this Court's mind that the owner of this split-zoned ten acre parcel is entitled to relief from the residential classification of half of this parcel which instead of regulating its use actually prohibits its utilization for any reasonably suitable purpose. However, there is more crucial and considerably more troublesome question as to whether the Board has the power to provide this relief in the form of a use variance.

In this posture this question draws into precise focus the Board's right to grant this use variance in face of its limited statutory power which inhibits it from exercising zoning powers under the guise of a

zoning variance (Matter of Levy v. Bd. of Standards & Appeals, 267 N. Y. 347, 352-354; Old Farm Rd. v. Town of New Castle, 26 N Y 2d 452; Van Deusen v. Jackson, 35 A D 2d 58, affd. 23 N Y 2d 698).

"[T]he extent of hardship which would justify the grant of a variance by a Board of Appeals is substantially equivalent to that which would warrant a court in declaring the ordinance confiscatory, unreasonable and unconstitutional in its application to the property involved if the matter were before the court in an action for a declaratory judgment or a proceeding in the nature of mandamus to compel the issuance of a permit. It is only because of the necessity on the part of the petitioner to seek administrative relief through the grant of a variance that the proceeding involves a variance rather than a plenary action; the difference lies in the form of relief sought and the forum, rather than the essential nature of the gravamen of the action. Consequently, decisions in which the facts before the court were held to be sufficient or insufficient, as the case might be, for a finding that the ordinance in question operated upon the property involved in such fashion as to be unreasonable and confiscatory are good authority in cases involving proof of hardship sufficient for the grant of a variance" (2 Rathkopf, Law of Zoning and Planning [3rd Ed. 1972], p. 45-13).

If this proceeding was an action for a declaratory judgment or one which the Court would be disposed to treat as such, if the Town had been a named party and thereby bound by its judicial declaration therein, the factual findings provide the evidentiary basis for a declaration that the residential zoning here is unreasonable, confiscatory and unconstitutional. Unlike other split-zoning situations, the residential zoning of the rear portion of this parcel does not maintain a buffer

between a less restrictive district, such as a business or industrial district, and a more restrictive one such as a residential zone. Rather it serves to separate the business zone from the ocean which does not require protection by means of split-zoning. A policy of preventing construction too close to the ocean itself and maintaining open spaces can be promoted by realistic set-back and area coverage regulations without resorting to totally restrictive zoning regulations.

The preservation of the "magnificent virgin beach" and the reservation of this residential parcel for municipal recreation use is clearly a legitimate governmental function. However, this can only be attained with respect to this private property by the Town's exercise of its eminent domain powers to acquire it and not by imposing a restrictive zoning ordinance which precludes its utilization for a suitable purpose. Since no legitimate legislative purpose is served by this restrictive classification, there exists no legal obstacle to a declaration of constitutionality in an appropriate action.

However, even though the evidentiary criteria for a use variance and a declaration of unconstitutionality are identical, the grant of a use variance assumes "there is no impediment arising to such grant from any limitation on the board's power" (2 Rathkopf, Law of Zoning and Planning, supra, note 15 at p. 45-14).

"The power to grant in a specific case a variation or dispensation from a provision of a zoning ordinance is subject to express limitations and to limitations clearly implicit in the ordinance. No power has been conferred upon the Board of Standards and Appeals to review the legislative general rules regulating the use of land. (citing case). The board does not exercise legislative powers. * * * Its function is primarily administrative. It has been intrusted only with power to grant a variation in specific cases where strict enforcement of

the restriction would cause practical difficulties or unnecessary hardship. Even then it may act only where the variation is in harmony with the general intent of the zoning restrictions so that 'the public health, safety and general welfare may be secured and substantial justice done.'" (Matter of Levy v. Bd. of Standards & Appeals, 257 N. Y. 347, 352-353). "A zoning board of appeals cannot under the semblance of a variance exercise legislative powers (cases cited). * * * Thus, the statute makes plain that both the general purpose and intent of the ordinance, reflecting the policy of the legislative body, and the special case of the individual property owner, reflecting a practical difficulty or unnecessary hardship, must be considered by the board of appeals in varying the application of the ordinance. * * * When the variance violates the general purpose of the ordinance, the board of appeals invades the province of the legislative body, and the grant is invalid for want of authority (cases cited). More precisely, the board of appeals must make certain that the effect of a variance would not introduce such an incongruity into the ordinance that the zoning pattern would be seriously disarranged" (Van Deusen v. Jackson, *supra*, pp. 60, 61).

"In determining whether the zoning province of the legislative body has been invaded, size is a significant factor (citing cases), for the variance which most closely resembles an amendment is one which applies to a large or extensive tract of land (citing case). Applications for variances which change the density or use of such tracts have been characterized as 'futile' and will not receive judicial approval (see Levitt v. Incorporated Vil. of Sands Point, 6 N Y 2d 269 [127 acres]; Scaradale Supply Co. v. Village of Scaradale, *supra*, [3.4 acres]; Van Deusen v. Jackson, *supra* [7.365 acres]; Gardner v. Le Boeuf, *supra* [19 acres]; Spadafora v. Ferguson, 132 Misc. 151, *affd.* 268 App. Div. 820

[33 lots - 13 houses]; Matter of Von Gerichten v. Schermerhorn, 40 Misc 2d 800 [14 parcels]; Matter of Northampton Colony v. Board of Appeals of Inc. Vill. of Old Westbury, 30 Misc 2d 459, aff'd. 15 A D 2d 830 [5.5 acres]; Matter of Hiscox v. Levine, 31 Misc 2d 151 [modification by planning bd. - 37.4 acres]; Matter of Hess v. Bates, 17 Misc 2d 22 [40 acres]; 2 Anderson, New York Zoning Law & Practice, § 18.58; 2 Rathkepf, Law of Zoning & Planning, § 39.10)." (Mtr. of Cohalan v. Schermerhorn, 77 Misc 2d 23, 25).

The size of the parcel for which the use variance application was made was approximately 94,000 square feet or 2.35 acres. The Board reduced the area to 56,000 square feet or 1.4 acres by limiting the approval to a depth of 45 feet instead of 75 feet. Furthermore, the use variance here, although limited by its approval to a specified part of the residential portion, actually benefits, as was pointed out in the earlier memorandum decision herein, and extends to the five acres encompassed in the residential zone.

Apart from the size of this parcel, which is larger than any other parcel for which a use variance has heretofore been judicially sanctioned, there are other considerations that dissuade this Court from providing to this parcel the relief to which it is entitled by the variance route. Not the least of these is that judicial approbation of this variance, which will permit a business use in a residential zone, without the benefit of a legislative change in the zoning ordinance, can be relied on as authority for a Board of Appeals providing similar relief whenever the extent of hardship sufficient to sustain a constitutional challenge has been demonstrated. Investing a Board of Appeals with such broad powers exceeds the scope of a policy of administrative flexibility which has disposed the Courts to recognize use variances as being within the statutorily limited powers of this appointed zoning agency.

Furthermore, the approval of this variance by this Court will confer upon the Board of Appeals even greater power than this Court itself would presume to invoke after declaring a zoning ordinance invalid because of its confiscatory nature. Following such a declaration, it is well established that an aggrieved property owner must nevertheless seek legislative approval of a specific use by a change in the zoning ordinance. A use variance on the other hand confers the benefit of the use directly and immediately and by-passes the need for any legislative action by the elected Board entrusted with the zoning authority. In addition, the ultimate effect of approving this variance is to invest in this appointed Board of Appeals more control over the zoning policies within the Village boundaries than is entrusted to the Village's elected officials (see County Government Law of Nassau County, Sec. 1607). It is highly unlikely that the legislature which enacted these provisions or the Courts which have construed them (*Incorporated Vill. of Atlantic Beach v. Town of Hempstead*, 27 A D 2d 556, *affd.* 19 N Y 2d 929) intended or contemplated such an unbridled grant of power to the Town's Board of Zoning Appeals.

For these reasons this Court is persuaded against any further relaxation of the statutory and judicial reins limiting the Board's powers which will further diminish the home rule powers of this Incorporated Village and at the same time distant the existing relationship between the Town Board and the Board of Appeals' role or influence in the determination of the zoning policy of the Town and this Village. Any relief to which the owner of this property may be entitled to must be obtained from the Town Board either before or after a successful challenge to the zoning ordinance. The Court's intervention can thereafter be invoked if the Town's legislative response to a

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successful challenge is not consistent with the judicial determination sustaining the challenge.

Accordingly, the petition herein is granted as to the use variance approved by the Board of Appeals and said variance is hereby annulled and set aside and denied as to the special exceptions for the reasons expressed herein and in this Court's earlier decision herein dated November 20, 1975.

J. S. C.

Letter from the Department of Housing and Urban
Development, Federal Insurance Administration,
Washington, D.C., dated May 27, 1975.



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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
FEDERAL INSURANCE ADMINISTRATION
WASHINGTON, D. C. 20410

Handwritten mark resembling a large 'X' or '7'.

IN REPLY REFER TO:

Mr. Walter G. Michaelis
Commissioner
Department of Planning and Economic
Development
Town Hall
Hempstead, New York 11550

27 MAY 1975

Dear Mr. Michaelis:

It has recently been brought to our attention that it is the Town of Hempstead which has the primary land use authority over zoning and subdivision regulations within the incorporated Village of Atlantic Beach, New York.

Since eligibility in the National Flood Insurance Program (NFIP) is granted only to jurisdictions with primary land use authority, the Village's flood insurance eligibility will be continued under the application of the Town of Hempstead. This means that the Village residents will still be eligible to purchase flood insurance as long as the Town is participating in the National Flood Insurance Program.

You are also advised that we will stop the appeals period for the recently published 100-year flood elevations for the Village of Atlantic Beach. Later when FIA issues the proposed flood elevations for the Town, the Village's 100-year flood data will be included and a new 90 day appeals period will be established.

If you have any questions, please let us know.

Sincerely,

J. Robert Hunter
Acting Federal Insurance Administrator

Signature of Richard W. Krimm
By Richard W. Krimm
Assistant Administrator
for Flood Insurance

RECEIVED

JUN 4

DEPARTMENT OF PLANNING
AND
ECONOMIC DEVELOPMENT

Letter dated August 28, 1975 to the State Housing and
Building Code Bureau from the Office of the Town Attorney
of the Town of Hempstead.



40b

W. KENNETH CHAVE, JR.
TOWN ATTORNEY

ALBERT LEONE
CHIEF DEPUTY TOWN ATTORNEY

OFFICE OF THE TOWN ATTORNEY

HEMPSTEAD TOWN HALL, TOWN HALL PLAZA
MAIN STREET, HEMPSTEAD, NEW YORK 11550
516 489-5000

August 28, 1975

SAMUEL J. BENSON, JR.
DANIEL P. MCCARTHY
GEORGE H. SCHNEIDER
JEFFREY L. STADLER
ROBERT C. WILLIAMS
DEPUTY TOWN ATTORNEYS

JOSEPH C. CALABRESE
EUGENE K. FERENCIK
C. WILLIAM GAYLOR
HAROLD A. JAFFE
ARTHUR J. NASTRE
HARRIETTE B. NORRIS
ASSISTANT TOWN ATTORNEYS

Mr. Louis Nielsen,
Director,
State Housing & Building Code Bureau
2 World Trade Center
New York, New York 10047.

Re: Federal Flood Insurance.
#TA8959.

Dear Mr. Nielsen:

As you know, the Town of Hempstead has adopted and operates under all the provisions of the State Building Construction Code (NYCRR, Part 600, Vol. 9B). The Town is also participating in the federally insured National Flood Insurance Program.

Kindly advise if the State Code Council has officially recognized the U. S. Army Corps of Engineers' publication entitled, "Flood-Proofing Regulations" (June, 1972, GPO: 19730-505-026, and subsequent editions), as a "generally accepted standard" for construction material and technique in flood prone areas.

Thank you.

Very truly yours,

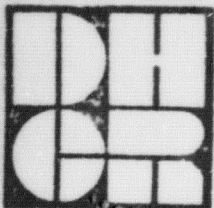
W. KENNETH CHAVE, JR.
Town Attorney

By *Eugene K. Ferencik*
Eugene K. Ferencik
Assistant Town Attorney

EKF/c

Letter dated September 12, 1975 from the Department of
Housing and Community Renewal to the Office of the Town
Attorney of the Town of Hempstead.

STATE OF NEW YORK EXECUTIVE DEPARTMENT
DIVISION OF HOUSING AND COMMUNITY RENEWAL
TWO WORLD TRADE CENTER, NEW YORK, N.Y. 10047



LEE GOODWIN
COMMISSIONER

LESTER EISNER, JR.
FIRST DEPUTY COMMISSIONER
PETER F. GAYNOR, JR.
DEPUTY COMMISSIONER

41b

EDMUND R. DAVIS COUNSEL

September 12, 1975

Eugene K. Ferencik, Esq.
Office of the Town Attorney
Hempstead Town Hall
Town Hall Plaza
Main Street
Hempstead, New York 11440

Re: Federal Flood Insurance
#TA3959

Dear Mr. Ferencik:

Your letter of August 28, 1975, on the above captioned subject has been referred to the undersigned for reply.

Please be advised that the State Building Code Council has officially recognized the U.S. Army Corps of Engineers' publication entitled, "Flood-Proofing Regulations," (June 1972 GPO: 19730-505-026), as a "Generally Accepted Standard," of the State Building Construction Code. The Council has not yet recognized any subsequent editions of this publication. The code states that applicable provisions of "Generally Accepted Standards," unless contrary to provisions of the code, constitute compliance with the code. Enclosed is a copy of the "Generally Accepted Standards" applicable to the State Building Construction Code.

If you have any further questions on this matter please do not hesitate to contact the undersigned.

Very truly yours,

Edmund R. Davis
Counsel

By Martin Finkelhor
Martin Finkelhor
Senior Attorney

Enc.

Decision of the Board of Zoning Appeals of the Town of
Hempstead in granting the proposed hotel use, subject
to conditions.

42 b

February 6, 1975

BOARD OF ZONING APPEALS:
TOWN OF HEMPSTEAD:
COUNTY OF NASSAU, STATE OF NEW YORK:

-----X

In the Matter of the Application of	:	
FOURTH OCEAN PUTNAM CORP.	:	CASE NO. 244
	:	:April 24, 1974
Extension of business use in con-	:	Re-opened to
junction with proposed hotel and	:	:November 27, 1974
bath club	:	

-----X

In the Matter of the Application of	:	
FOURTH OCEAN PUTNAM CORP.	:	CASE NO. 245
	:	:April 24, 1974
Use premises for hotel	:	Re-opened to
	:	:November 27, 1974

-----X

In the Matter of the Application of	:	
FOURTH OCEAN PUTNAM CORP.	:	CASE NO. 246
	:	:April 24, 1974
Permission to park in front setback	:	Re-opened to
area.	:	:November 27, 1974

-----X

In the Matter of the Application of	:	
FOURTH OCEAN PUTNAM CORP.	:	CASE NO. 247
	:	:April 24, 1974
Use premises for bath club	:	Re-opened to
(lockers & cabanas)	:	:November 27, 1974

-----X

In the Matter of the Application of	:	
FOURTH OCEAN PUTNAM CORP.	:	CASE NO. 248
	:	:April 24, 1974
Construct swimming pool for accessory	:	Re-opened to
use to hotel and bath club.	:	:November 27, 1974

-----X

Mr. Rose offered the following resolution and moved its adoption which was duly seconded by Mr. Trapani.

RESOLVED that the following Findings of Fact and Decision are hereby adopted.

STATEMENT

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FIRST: An examination of the record affecting this property indicates the following:

CASE NO. 296 - November 15, 1961 An application to construct addition to hotel. Decision: 1/12/62 Withdrawn.

CASE NO. 447 - May 2, 1962 An application to construct hotel with accessory parking area. Decision: 7/26/62 Denied findings. 2/20/63 - further hearing pursuant to order of remand of Supreme Court dated December 24, 1962. Decision: Dismissed - no construction on site.

CASE NO. 209 - March 21, 1973 An application to construct and use buildings for resident hotel and tennis club (portion in Bus. Zone). Decision: 6/28/73 Withdrawn at hearing.

CASE NO. 210 - March 21, 1973 An application to construct and use buildings for resident hotel and tennis club (portion in Res. "B" zone). Decision: 6/28/73 Withdrawn at hearing.

CASE NO. 211 - March 21, 1973 An application to use premises for place of public assembly and amusement (bath & tennis club). Decision: 6/28/73 Withdrawn at hearing.

CASE NO. 212 - March 21, 1973 An application for variance in required off-street parking and permission to park in front setback areas. Decision: 6/28/73 Withdrawn at hearing.

CASE NO. 435 - June 13, 1973 An application for extension of business use in conjunction with proposed residence hotel, bath, tennis club. Decision: 6/28/73 Withdrawn at hearing.

CASE NO. 436 - June 13, 1973 An application to use premises for place of public assembly (swimming pools for hotel). Decision: 6/28/73 Withdrawn at hearing.

CASE NO. 437 - June 13, 1973 An application to construct accessory parking deck. Decision: 6/28/73 Withdrawn at hearing.

SECOND: Exhibits submitted into evidence are as follows:

April 24, 1974

Survey	Applicant's Exhibit 1
Plot plan and plans	Applicant's Exhibit 2
Area Map	Applicant's Exhibit 3
Chain of Title	Applicant's Exhibit 4
Statement of Income and Expense	Applicant's Exhibit 5
Qualifications of Appraiser	Applicant's Exhibit 6
Section of Zoning Map	Applicant's Exhibit 7
Photographs	Applicant's Exhibit 8
Resume of Qualifications of Traffic Engineer	Applicant's Exhibit 9
Report showing beach club generated parking	Objectors' Exhibit A
Qualifications of Traffic Engineering Consultant	Objectors' Exhibit B
Amended Map of Atlantic Beach	Objectors' Exhibit C

May 30, 1974

Filed Map	Objectors' Exhibit A
Deed (one)	Objectors' Exhibit B
Qualifications of Appraiser	Objectors' Exhibit C
Photographs	Objectors' Exhibit D
2 Aerial Photos, 1 other (corner plot)	Objectors' Exhibit E
List of Names	Objectors' Exhibit F
Qualifications of Erick R. Gidlund	Objectors' Exhibit G
Letters	Objectors' Exhibit H
Water Report of Seymour Radow	Objectors' Exhibit I

Miscellaneous Material	Objectors' Exhibit J
Photographs	Objectors' Exhibit K
Photographs	Objectors' Exhibit L
Letter of Gloria & Barry Lipschitz	Objectors' Exhibit M
Letter with hotel rates	Objectors' Exhibit N
Statement of Morris Kramer	Objectors' Exhibit O
NOAA Technical Memorandum Nos 12	Objectors' Exhibit P
Miscellaneous Papers, Clippings, etc.	Objectors' Exhibit Q
<u>November 27, 1974</u>	
Amended plot plan and plans	Applicant's Exhibit 1
FIA Flood Hazard Boundary Maps	Objectors' Exhibit A
Correspondence	Objectors' Exhibit B
Correspondence N.Y. State Department of Environmental Conservation	Objectors' Exhibit C

THIRD: Objectors appeared and testified at the time of public hearing.

FOURTH: A motion was duly made, seconded and carried that these applications be consolidated and heard as one.

FINDINGS OF FACT

After considering all of the testimony taken, the record before the Board and after a study of the Exhibits, the Board's findings are as follows:

FIRST: The applications herein concern a parcel of land having a frontage of 1253.21 feet on the south side of Ocean Blvd. between Vernon Avenue and Putnam Blvd. in the Incorporated Village of Atlantic Beach. The parcel is within a Business District to a depth of 170 feet; the remaining depth

is zoned Residence "B", is irregular and varies from approximately 210 feet to 270+ feet as it extends to the mean high water line of the Atlantic Ocean. The parcel is presently improved with a 6 story hotel set back 11.6 ft. from, and having a frontage of 140+ feet on the south side of Ocean Blvd. The easterly side of the hotel is approximately in line with the westerly side of Suffolk Blvd. and the hotel thus extends westerly the said 140+ feet from Suffolk Blvd. The hotel then curves southwesterly and westerly, reducing to two stories and then rising to three stories. The hotel therefor extends some 305 feet along Ocean Blvd. the westerly wing however, being set back approximately 110 feet. A 2 story one-story accessory building, approximately 48 ft. x 40 ft., set back 16.4 feet from Ocean Blvd. and is located just east of Suffolk Blvd.

Abutting the Business district on its south is a boardwalk, owned by the applicant. Part of the hotel itself appears to encroach onto the boardwalk some 20 feet and underneath the boardwalk, cabanas extend parallel to Ocean Blvd. for some 1063 feet; an additional line of cabanas, parallel to the cabanas aforesaid (347 feet in length) extends some 20 feet south of the boardwalk. In addition, there are storage facilities and a snack bar under the boardwalk. The present facility and use therefor extends some 30 feet into the Residence "B" for practically the entire width of the parcel and 50 feet for that portion including the most southerly line of cabanas. (See Applicant's Exhibit #1 of Hearing of March 5, 1974). The parcel further contains additional cabanas, lockers, a swimming pool, wading pool and Tennis Courts. The hotel contains 100

units; there are 172 cabanas and 340 lockers. The off-street parking ordinance requires 834 off-street parking spaces for the present facilities and 279 spaces are provided. Nonetheless, the facilities are permitted since they are non-conforming uses.

SECOND: Applicant purchased the parcel herein in 1972 and alleges that the facility is run down and as presently constituted, is extremely difficult to realize a reasonable return. Statements were submitted indicating substantial losses for the present operation. It therefore proposes to demolish all existing facilities and erect a new hotel complex. At the first hearing, the hotel was submitted as a 7 story structure, 60 feet high, which included a ground floor parking area under grade. The hotel was to have 204 units, each of which was to consist of a full bath, powder room and toilet, 12 ft. x 18 ft. bedroom, 12 ft. x 18 ft. living room a 10 ft. x 11 ft. entry foyer, dressing room with vanity, 12 linear feet of closet space, storage space and a 6 foot "wet" bar. The typical unit was to be 750 square feet in area although several units on each floor were to be somewhat larger.

The total off-street parking required for the proposed facilities is 692 spaces and 715 are provided. However, of the 715, 124 spaces are in a portion of the Residence "B" area to the rear. Although 114 spaces are partially in the front setback area, they are not in the required setback (see paragraph "Sixth" herein).

At the hearing of November 27, 1974, applicant reduced its request by eliminating the entire top floor. This reduced the number of hotel units from 204 to 170. In addition applicant represented as follows:

- 1) That the wet bar will be removed from the construction plans.

2) That there will be no kitchen facilities available in any of the rooms.

By reason of the 30 hotel unit reduction, the parking requirement was reduced by 30, to 658 with 713 provided, since 2 spaces were eliminated for a refuse pick-up area. The hotel's overall height was reduced to 54 feet and the ground floor parking was raised to eliminate ramps, which were controversial as to their useability.

The proposed hotel is to consist of an easterly and westerly wing, both 6 stories in height, as reduced. The center or entry portion is two stories in height and the roof thereof will serve as a sundeck. Also proposed are 100 cabanas and 200 lockers, which are respectively 72 and 140 less than the present non-conforming facility.

THIRD: In Case No. 245, applicant seeks the use itself, to wit: a transient hotel. Such a hotel is not a prohibited one and does not require a variance for its approval. Rather, it is a special exception and as such applicant need only prove compliance with the Ordinance standards. In fact, the right to a special exception is so strong, that the Court in North Shore Steak House vs. Board of Appeals, 30 N.Y. 2d 242, 331 N.Y.S. 2d 645, has declared a special exception use's inclusion in the Ordinance to be "tantamount to a legislative finding that the permitted use (special exception) is in harmony with the general zoning plan and will not adversely affect the neighborhood." Nonetheless, the Board will hereinafter consider the Ordinance standards.

Before proceeding further, the Board will first dispose of one of the issues raised by the Village of Atlantic Beach. It was the Village's contention that the Building Zone Ordinance permitted only a "transient" hotel as a special exception; that the proposed hotel was not designed for

transients and would not be a transient hotel as defined in the Ordinance. The applicant's contention was that the hotel would be a "transient" one, although in the luxury class, and that the Ordinance would be complied with. The Board heard the opinion of the Village's expert witness, but finds on the record, that the Board cannot conclude that the hotel would not be a "transient" hotel. In fact, the Village's expert testified that it would be possible to operate the planned structure as a transient hotel, although in his opinion, with certain problems. For this Board to conclude that the hotel would not operate as a transient hotel would therefor be entirely speculative. Nonetheless, the application has been made as a transient hotel, this Board has considered the use only as a transient hotel and any decision herein will be based on the use as a transient hotel.

The Board will now discuss the area character and history referable to Atlantic Beach. The south side of Ocean Blvd. for its entire length within the Incorporated Village of Atlantic Beach is in a Business district which abuts a beach, which is in a Residence "B" district. The south side of Ocean Blvd. is improved with various beach clubs, cabana-locker facilities and two hotels.

In 1960 the Court in Goldsmith v. Michaelis et al, N.Y.L.J. 11/18/60 page 17 sustained the Board in approving a hotel on the west side of Putnam Avenue across the street from the subject parcel.

In 1961, the Nautilus Hotel, on the south side of Ocean Blvd. and in the westerly area of Atlantic Beach, was approved as a special exception and all standards of the Ordinance were found to be complied with by the proposed hotel use.

In 1962 an application was made to this Board to subdivide the present subject parcel and to erect another hotel on the excised portion. (Objectors' Exhibit K). The Board denied the application, not on the grounds of non-compliance with the Ordinance standards, but primarily that the Atlantic Beach Hotel would be left deficient in parking. Judge Hogan in the Supreme Court's decision dated December 11, 1962 stated, "The Board of Appeals has made no finding that the petitioner's proposed use will not meet any of the seventeen standards enumerated in the Ordinance (Article 12, Sec. Z-1.0, sub'd b). Such a finding would not have been supported by the record". The hotel was never built, since the Appellate Division reversed on other grounds, when the Town of Hempstead increased the off-street parking requirements.

The old Surf Hotel property which is also at the westerly end of the Village was the subject of an application to this Board by Phillipstown Park Inc. in January 1973 for the purpose of demolishing the old hotel thereon and erecting a new one. The application was granted and at that time the Board found that the hotel use met all the standards of the Ordinance.

In view of the past determinations of this Board referable to hotels and the action of the Court, it would be a complete turn-about to deny a hotel use. Therefor, unless there is some change in the character of this area of Atlantic Beach or some new facts that will demonstrate a violation of the Ordinance standards by this proposed hotel, a hotel use will of necessity be approved. The Board has considered all the standards of the Ordinance and finds no reasons to reverse history. In fact, the Board finds that a hotel use will meet

all the standards of the Building Zone Ordinance. The Board heard testimony of both the applicants' and the Village's real estate expert. The Board finds that the south side of Ocean Blvd. is improved with beach type resort uses - cabana clubs, beach clubs, recreation-resort areas and hotels. The Board finds that the character of the existing uses and the probable development of uses in the district is that of cabana clubs, beach resort uses and hotels, and that the district is suitable for such uses.

The Board finds that the north side of Ocean Blvd. is improved with one family dwellings; that any effect on those dwellings was created when the south side of Ocean Blvd. was zoned Business; that the proposed use will neither have an adverse effect on, nor depreciate values of surrounding properties; that considering the realities of the existing zoning districts and the existing improvements, that the proposed use will conserve property values, and encourage the most appropriate uses of land.

The Board has heard all the testimony and finds that if the off-street parking ordinance is complied with, the proposed use will not be responsible for the creation of an undue increase of vehicular traffic and congestion on the public streets and highways.

The Board finds that the proposed use does not create any unusual or unique refuse and that there is available adequate and proper public or private facilities for the treatment, removal or discharge of sewage, refuse or other effluent that may be caused or created by or as a result of the use.

The Board finds that the use will not give off obnoxious gases, odors, smoke or soot; nor cause disturbing emissions of electrical discharges, dust, light, vibration or noise.

The Board finds that the use will not cause undue interference with the orderly enjoyment by the public of existing parking or recreational facilities, nor of any such proposed.

As approved hereinafter, the use will provide parking in excess of the off-street parking ordinance requirements.

The Board finds that if the use is constructed and maintained in accordance with the pertinent construction codes and fire safety requirements, that the use will not create a hazard to life, limb or property because of fire, flood, erosion or panic resulting from such use, or by the structures, or by the inaccessibility of the property or structures for the convenient entry and operation of fire and other emergency apparatus or by the undue concentration or assemblage of persons upon such plot; that the use is simply not a hazardous one.

The Board finds that the use as approved will comply with height requirements and will provide sufficient off-street parking; the hotel will occupy a very small portion of the plot; that the use will not cause an undue concentration of population nor an overcrowding of land.

The Board finds that the plot area is sufficient, appropriate and adequate for the use and the reasonably anticipated operation and expansion thereof.

The Board finds that the physical characteristics and topography of the land is substantially flat and suitable for the use.

The Board finds that the use is not unreasonably near to a church, school, theatre, recreational area or other place of public assembly.

The Board notes that Mayor Lager of the Village, at the hearing of November 27, 1974 (pg. 10558) made the point that the building and the project should be confined within the Business district and otherwise conform to regulations; he did not object to a transient hotel per se. The Village's real estate expert also testified that he agreed with the new transient hotel, but objected to it as oversize because of variances sought in connection therewith. The Board notes that the variance to park in the front setback area is no longer necessary (see paragraph "Sixth" herein) and that one floor of the hotel has been removed from the application.

Several residents appeared and raised objections to the hotel because it would block their view of the ocean, that it would increase salt water intrusion, that because of its draw on the water supply, water pressure would be low and therefore a possible hazard in case of fire, and construction of a hotel might result in the Town's suspension from the National Flood Insurance Program.

As to the possible interference with the view, the Board members have stood on the north side of Ocean Blvd. and could not see the ocean in any event. In fact, the boardwalk with cabanas thereunder all along the ocean, completely block an ocean view. It is possible that looking out second floor windows of houses actually on Ocean Blvd., that the ocean could be seen. However, there is no vested right of property owners north of the parcel to see the Ocean. The property on the south side of Ocean Blvd. has had the right to erect a six story or 60 ft. high building since zoning began in 1930. It is thus the use that is subject to special exception examination, not the height. It must be presumed that every person buying property

to the north, knew or should have known that the south side of Ocean Blvd. was zoned Business and could have a 60 ft. high building erected thereon as a matter of right. The Board finds that this objection has no merit and that the proposed 54 ft. height is permitted as a matter of right and will not violate the Ordinance standards.

As to the objections referable to water supply, the Board has examined a letter from the New York State Department of Environmental Conservation submitted by the objectors, Exhibit "J" (B) which refers therein to no water problem and apparently to the contrary, describes the existing system as one where no one well supplies a given locality, but rather a system where all wells connect to a common distribution system whereby water may be sent where and when it is needed. Furthermore, this Board has heard no evidence that the water utility has been unable to service the present facilities nor that water service has in any way been inadequate while servicing the present facilities. It is impossible for this Board on the record, to conclude that the proposed use will so upset the water supply as to cause insufficient water pressure in case of fire.

There was testimony by the objectors' expert whereby this Board could conclude that an increased demand on water could increase the intrusion rate of the salt water wedge landward. However, it was brought out from this same expert, that use of water anywhere in Nassau County would affect the intrusion rate. This Board cannot stop a use because of some unknown effect on the salt water wedge from a hotel use.

Certainly there was no evidence of any adverse effect nor of any imminent peril to the water supply. In fact there was no evidence as to any time in the future that the proposed use would place the water supply in peril. The Board finds the objectors' position untenable, that any possible water difficulties are speculative and would apply equally to any use permitted as a matter of right anywhere in the Town of Hempstead.

The Board will not discuss the objection referable to the National Flood Insurance Program. Heretofore Federal legislation was enacted which provided for subsidizing flood insurance premiums for property owners in certain "Flood plain" or "flood-prone areas." Property owners could avail themselves of such subsidized insurance if their community agreed to adopt and enforce adequate land use and control measures, consistent with Federal criteria. The Town has been part of that program since September 10, 1971.

Objectors took a position that the proposed hotel construction could result in the Town's suspension from the said insurance program. Firstly, it is highly questionable whether such a possibility could legally be considered as a special use standard; certainly no such standard appears in the Building Zone Ordinance. Secondly, the Federal legislation does not prohibit construction in flood plains. Objectors submitted a copy of the pertinent legislation, Objectors' Exhibit J (P-7). A reading thereof reveals that what is sought, is a building permit requirement for all construction and that construction be of such a kind and of such elevations that would minimize or prevent flood damage. In fact Section 1910.3 (a) (2) of Title 24 states as follows:

"If a proposed building site is in a location that has a flood hazard, any proposed new construction....must (i) be designed....and anchored to prevent flotation, collapse or lateral movement of the structure (ii) use construction, materials and utility equipment that are resistant to flood damage, and (iii) use construction methods and practices that will minimize flood damage." Thus the Board must conclude that the legislation anticipates construction. This Board is duty bound to act within the framework of the Ordinance and court decisions referable thereto. This Board firmly believes that the hotel use meets the standards of the Ordinance and that it must therefore grant the special exception.

The Board determines as follows:

1. That the proposed use will not prevent the orderly and reasonable use of adjacent properties or of properties in adjacent use districts;
2. That the proposed use will not prevent the orderly and reasonable use of permitted or legally established uses in the district wherein the proposed use is to be located or of permitted or legally established uses in adjacent use districts;
3. That the safety, the health, the welfare, the comfort, the convenience or the order of the Town will not be adversely affected by the proposed use and its location; and
4. That the proposed use will be in harmony with and promote the general purposes and intent of the Ordinance.

FOURTH: As to Case No. 247, which seeks both club approval for lockers and cabanas, this too is a special exception. The Board finds the area character on the south side of Ocean Blvd. to be replete with such uses. The Board

finds that such a use will comply with all the Ordinance standards. The Board also notes that no objections were raised to this use.

The Board determines:

1. That the proposed use will not prevent the orderly and reasonable use of adjacent properties or of properties in adjacent use districts;
2. That the proposed use will not prevent the orderly and reasonable use of permitted or legally established uses in the district wherein the proposed use is to be located or of permitted or legally established uses in adjacent use districts;
3. That the safety, the health, the welfare, the comfort, the convenience or the order of the Town will not be adversely affected by the proposed use and its location; and
4. That the proposed use will be in harmony with and promote the general purposes and intent of the Ordinance.

FIFTH: As to Case No. 248, the proposed accessory swimming pool is also a special exception application. Although the full extension of business use in Case No. 244 will not be granted, and the pool will of necessity be located elsewhere on the parcel, the Board does find that a pool is a frequent concomitant to the hotel-bath club use and will in all respects comply with all ordinance standards; that a pool for this complex will be in complete harmony with the area character. The Board determines:

1. That the proposed use will not prevent the orderly and reasonable use of adjacent properties or of properties in adjacent use districts;

2. That the proposed use will not prevent the orderly and reasonable use of permitted or legally established uses in the district wherein the proposed use is to be located or of permitted or legally established uses in adjacent use districts;

3. That the safety, the health, the welfare, the comfort, the convenience or the order of the Town will not be adversely affected by the proposed use and its location; and

4. That the proposed use will be in harmony with and promote the general purposes and intent of the Ordinance.

SIXTH: As to Case No. 246, the applicant seeks permission to park partially in the front setback area. The Board finds that this case is no longer necessary to accomplish the proposed front yard parking.

Under a recent amendment to the Building Zone Ordinance effective July 29, 1974, the average setback for Business districts will not be measured by setbacks in Residence "B" districts. Thus, although there is no average on Ocean Blvd. in the subject block, the average may not be determined by the residences on the north side of Ocean Blvd. The setback required is rather governed by Section X-5.3 of the Building Zone Ordinance, to wit: 10 feet. Since the proposed parking area will allow for a 10 foot setback, there is no violation. Case No. 246 therefor has become academic and will be dismissed.

SEVENTH: Applicant in Case No. 244 requests an extension of business use for 75 feet south into the Residence "B" district in conjunction with the proposed hotel and bath club. The basis for this request is practical difficulties and unnecessary hardship.

The first 30 feet of this extension is actually the 30 foot width of the boardwalk, the remaining 45 feet being beach area. The Board finds that the subject parcel, including the boardwalk at present extends a maximum of 50 feet into the Res. "B" district to accommodate lockers, cabanas and refreshment areas. The Board finds that lands to the west presently accommodate cabanas under the boardwalk and project approximately 9 feet further into the Res. "B" district with an enclosure type structure. In addition, the Village submitted photocopies of deeds wherein the Atlantic Beach Holding Corp. conveyed 3 strips of land running southerly to the Atlantic Ocean (Lots 521, 537 and 539) to the Town of Hempstead. Those deeds contained reservations which reserved to the Atlantic Beach Holding Corp. and its assigns. "the perpetual, full, unrestricted, sole and exclusive right, privilege and easement to maintain and repair such present buildings, walks, structures and improvements, and to maintain, use, repair, erect, construct, re-construct, build, re-build, replace and restore any structures providing they are limited to cabanas, cabins, shower rooms, refreshment stands, walks, and storage rooms, and providing that such structures to be erected not extend or project beyond 9 feet south of the southerly line of the surface of the existing boardwalk."

The Board thus finds that an extension of business use into the Res. "B" district is an existing and accepted area characteristic. However, this Board finds neither practical difficulties nor unnecessary hardship to justify the extension sought in its entirety. The Board has carefully examined applicant's plot plan and finds that an extension of

45 feet will permit a reasonably sized cabana with adequate walks abutting. The Board finds that applicant's concept of a luxury type transient hotel with spacious cabana facilities is a reasonable use for the parcel; that the extension of business use limited to 45 feet will permit such reasonable use with no adverse effect on, or change in, the area character. The Board finds that any deeper business incursion into the Res. "B" district would actually change the area character and subject the entire beach area to business use.

DECISION

Based on the findings set forth hereinabove, the application in CASE NO. 246 is in all respects DISMISSED; the applications in CASES NO. 244, 245, 247 and 248 are in all respects GRANTED in accordance with applicant's amended plot plan and plans (Applicant's Exhibit #1 of November 27, 1974, subject to the following conditions:

1. That the hotel use approved herein be limited to a transient hotel as defined in the Building Zone Ordinance of the Town of Hempstead.

2. That there be no "wet bar" facilities provided in any of the proposed hotel units; that all provision for same be excised from all plans and construction plans.

3. That there be no kitchen facilities provided or available in any of the hotel units, nor shall such facilities be shown on any plans or construction plans.

4. That applicant comply with Section G-7.1 and all sub-paragraphs thereunder, of Article 14 of the Building Zone Ordinance of the Town of Hempstead.

5. All plans, construction plans and exhibits shall be deemed modified to reflect the conditions imposed by the Board. Any resultant changes shall not require further Board review, provided such changes do not require additional variances.

6. That the extension of business use be limited to a maximum of 45 feet, except as limited by condition #7.

7. That as to lots 521, 537 and 539 shown on applicant's amended plot plan (Exhibit #1 of November 27, 1974) there shall be no extension of business use thereon beyond a line 9 feet south of the southerly line of the boardwalk.

AYES: Mr. Granito
Mr. Peterson
Mr. Trapani
Mrs. Walker
Mr. Rose
Mr. Yachnin
Mr. Wexner

NOES: None

Article 12-Z-5.0(c)(11) of the Building Zone
Ordinance of the Town of Hempstead.

BUILDING ZONE ORDINANCE OF THE TOWN OF HEMPSTEAD

"ARTICLE 12-BOARD OF APPEALS

Sec. Z-5.0. The Board of Appeals may, after public notice and hearing, permit the following uses in the districts designated:

c. In a Business District:

11. Hotels, lodging house, boarding house, auto court, motel. "

Section G-7.1 of Article 14 of the Building Zone
Ordinance of the Town of Hempstead.

health, safety, morals or the general welfare of the community

SEC. G-7.1. (a) For the purposes of this section, the word "parcel" shall mean any lot, plot or parcel of land having an aggregate area of one acre or more for the improvement of which an application for a building permit shall be filed and which is or are proposed to be developed or improved as a single unit or project by one person or any number of persons associated for that purpose, whether or not said lots or pieces shall be in separate ownership and whether or not any buildings, structures or other improvements exist thereon, but shall not include a lot, plot or parcel of land proposed to be developed or improved exclusively by one family or two family dwellings.

b) No building permit shall be issued for the use of any such parcel or for the installation, erection or alteration of any building or structure thereon or otherwise for the improvement of such parcel or any part thereof unless there shall be submitted to the Town Board of the Town of Hempstead a site plan of the premises or such part, prepared by and submitted under the seal of licensed professional engineer or architect, showing the proposed use, dimension, types and locations of each of the buildings, structures or other improvements proposed to be installed, erected or altered thereon, and the provisions proposed to be made for the facilities and improvements referred to in the paragraphs below numbered "1", "2", "3", "6", "7", "8", and "9" and unless and until the said Town Board shall by resolution have approved the same after giving due consideration to:

1. The provisions, including grading and paving made for the draining and disposition of storm and surface water;
2. The effect of the proposed use upon the movement of the vehicular traffic in the vicinity including consideration of the provisions for access of such traffic between the premises and public highways;
3. The availability of or provisions made for the treatment, removal, or discharge of sewage or other effluent (whether liquid, solid, gaseous or otherwise) and the removal of garbage and other refuse created or generated by or as a result of the proposed use of the premises;
4. Possible overcrowding of land or undue concentration of population resulting from the proposed use of the premises or the nature, size or location of the buildings, structures or improvements proposed to be erected or installed thereon;
5. The proximity of the proposed buildings, structures or improvements to each other and to other premises or buildings on such other premises depending on whether the uses proposed therein may create or discharge obnoxious gases, odors, smoke, dust, light, vibration or noise;
6. The provisions for fencing the premises from abutting properties and for the landscaping or other treatment of open, unused areas;
7. The provisions for on-premises parking and for loading areas and facilities;
8. The provisions for the lighting of parking areas, roads, walks and other open areas to be used by the public;
9. Approval by the Nassau County Department of Public Works or the New York State Department of Public Works, as the case may be, of drainage provisions affecting curb cuts or other installations in County and State roads;
10. The provisions of adequate facilities for refuse and garbage storage and collection;

11. Such other matters as the Town Board may require in order to effect the purposes defined in Section 263 of the Town Law of the State of New York

(c) Upon the receipt of such site plan, the Town Board may, in its discretion, either refer such plan to the Town of Hempstead Planning Board for the purpose of making a report and recommendations with respect thereto, or delegate to the Planning Board the authority to approve such plans

(d) The Town Board shall have the right at all times to modify or alter said site plan after issuance of said Building Permit and Certificate of Occupancy with the consent of the holder thereof or his successor in interest

(e) The Town Board shall have the right at all times to modify or alter said site plan after issuance of said Building Permit and/or Certificate of Occupancy with the consent of the holder thereof or his successor in interest

(f) Nothing contained in the Section shall be deemed to require the submission or approval of a site plan as a condition precedent to the issuance of a permit for the repair or alteration of any building or structure for which a certificate of occupancy or completion is then in effect, provided, however, that such alteration shall make no substantial change in any exterior dimension of such building or structure and shall comply with every lawful condition or limitation, theretofore imposed by a town officer or board on the construction, maintenance, occupancy or use of such building or structure.

(g) The Town Board may by resolution waive any of the requirements of this section upon approval of a written application from a duly organized religious or eleemosynary institution or body. The application shall be filed with the Town Board and shall set out in detail the reasons for the request for such waiver, and be executed by an officer or attorney empowered to sign such an application. (eff. 5/14/70)

SEC. G-8.0. BUILDING DAMAGED BY FIRE: No building which has been damaged by fire or other causes to the extent of more than fifty (50%) per cent of its replacement value, exclusive of foundations, shall be repaired or rebuilt except in conformity with the regulations of this Ordinance and Building Code. (eff. 7/19/69)

SEC. G-9.0. It shall be unlawful and deemed a violation of this ordinance for the owner of a parcel of property to subdivide same either by sale, devise, gift or otherwise into smaller plots which would result in the creation of one or more undersized or substandard sized plots, with relation to area and street frontage and minimum width requirements of this ordinance, in effect at the time of such subdivision and any plot so created shall be deemed to be in violation of the ordinance and said violation shall be deemed to extend and apply to all newly created lots out of the original plot subdivided whether or not one or more of the newly created plots is technically in conformity with the then existing ordinance.

SEC. G-9.1. No Lot Area shall be reduced so that the dimensions of any of the open spaces shall be smaller than herein prescribed

SEC. G-10.0 (Repealed May 26, 1964)

SEC. G-10.1. (Repealed May 26, 1964)

SEC. G-11.0. (Repealed September 24, 1957.)

SEC. G-11.1. Municipal or Public Use: Notwithstanding any other provisions of this Ordinance, buildings, structures, and premises

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-7523

RUTH RADOW and SEYMOUR RADOW,

Plaintiffs-Appellants,

against

MESSRS. GRENITO, PETER RAPANI, WALKER,
ROSE, YACHNIN and SEXNER, Constituting the
Board of Zoning Appeals of the Town of
Hempstead, State of New York, and THE FOURTH
OCEAN PUTNAM CORPORATION, and THE TOWN OF
HEMPSTEAD,

Defendants-Appellees.

Appeal From United States District Court
for The Eastern District of New York

Affidavit of Service By Mail

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

Louis Mark, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 4th day of February 1977 he served three copies of the attached Appendix On Behalf of Messrs. Grenito, et al., Constituting The Board of Zoning Appeals of The Town of Hempstead, State of New York, and The Town of Hempstead, Defendants-Appellees, on Ruth Radow and Seymour Radow, Pro Se, Attorneys for Plaintiff-Appellants, and on Margiotta, Levitt & Ricigliano, Attorneys for Defendant-Appellee The Fourth Ocean Putnam Corporation, by enclosing said copies in fully post-paid wrappers addressed as follows and depositing same in The United States Post Office maintained at No. 350 Canal Street, New York City, New York.

Ruth Radow and Seymour Radow
50 Tioga Avenue
Atlantic Beach, New York 11509

Margiotta, Levitt & Ricigliano, Esqs.
955 Front Street
Uniondale, New York 11553

Louis Mark
Louis Mark

Sworn to before me this

4th day of February 1977

Sylvia Morris

SYLVIA MORRIS
Notary Public, State of New York
No. 314526651
Qualified in New York County
Commission Expires March 30, 1978.

LEX PRINTING CO., INC., 451 GREENWICH ST., N.Y. 10013—966-4300

APPLICANT'S EXHIBIT 1
Hearing NOV. 27, 1974



244.113	CL-En-4T-2.5
170 44 TB	170
2. na 452 5250	180
15 EM 10724	4
170 45248	200
500 40748	124

TOTAL PAVING REQ. 638

TOTAL PAVING REQUIRED 713 SQUARE FT. 1256 OF 2 SQUARE FT. FOR TRASH COLLECTION

EXPLANATORY SECTION

504.5 : 42

 $\Delta^+ \Delta^- - C$

054.

ALLER 2203

PLOT PLAN

156-1 43

5567 04 58
8-252 143
-075 243 52! 536 7. 539

AMENDED
RECEIVED
NOV 13 1974
BOARD OF ZONING APPEALS

A	11.10.72	REVISED AS PER BOARD OF DIRECTORS ACTION OF 11.10.72	2.5.73	2.5.73
	05.12.72	AS PER DIRECTORATE OF BUDDING, CAL CUTAN	4.5.73	FWG. G.
	17.7.76	148	1.5.76	1.5.76
	10.10.79	148	1.5.79	1.5.79
REV. NO.	DATE	REVISION	BY	CHKD. BY

G E N C O R E L L I & S A L O A R C H I T E C T S
66 THIRD AVENUE, MINEOLA, NEW YORK 11501
516 • 248-2150 212 • 895-5382

PROJECT

PROSPECT - OIL

47.64" x 5.85" 1.5" 10.14"

17

JOB NO: 1221-26		DRWG. TITLE: PLOT P-24	SHEET NO. 1
DRAWN BY: JWH	CHECKED BY: AFG	OF. 1	